

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7177

75-7177

LONG ISLAND LIGHTING COMPANY,

Plaintiff-Appellant,

-against-

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC.,
MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY
AND TEXACO OVERSEAS PETROLEUM COMPANY,

Defendants-Appellees.

B
P/S

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

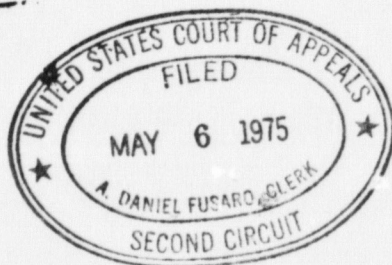
Plaintiff-Appellant,

-against-

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC.,
MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY
AND TEXACO OVERSEAS PETROLEUM COMPANY,

Defendants-Appellees.

BRIEF OF
THE NEW YORK STATE PUBLIC SERVICE COMMISSION
AMICUS CURIAE



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May 1975

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INC., MOBIL OIL CORPORATION, CHEVRON OIL :
TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM :
COMPANY, :

Defendants-Appellees. :

CONSOLIDATED EDISON COMPANY OF NEW YORK, :
INC., :

Plaintiff-Appellant, :

-against- :

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INC., MOBIL OIL CORPORATION, CHEVRON OIL :
TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM :
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Defendants-Appellees. :

BRIEF OF
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AMICUS CURIAE

The Public Service Commission of New York, which
regulates the public utilities within the State, respectfully
submits this brief, amicus curiae, in support of the position
of the appellants for reversal of the judgment of the United

States District Court, Southern District of New York (Wyatt, J.) entered March 5, 1975. That judgment dismissed the anti-trust claims of each complaint in the above consolidated action.

In our view, the court below erred in essentially construing too narrowly the purpose and objectives of the private law suit aspects of the anti-trust laws when it found that appellants lacked standing to sue and when it summarily decided, assuming such standing, that there was no injury from the asserted anti-trust violation, particularly because plaintiffs did not compete. We urge in this brief that the interests of the more than three million electric customers served by the two public utility appellants require reversal of such dismissal and a trial on the merits.

STATEMENT

Appellants are public utilities subject, inter alia, to regulation by the New York Public Service Commission of their rates and charges for electricity and the Commission's authority to fix just and reasonable rates pursuant to Sections 65 and 66 of the New York Public Service Law.

Long Island Lighting Company (LILCO) serves an approximate 840,700 customers in the Long Island area and its territory comprises a portion of Queens County and all of Nassau and Suffolk Counties. Consolidated Edison Company of New York, Inc. (Con Edison) provides electricity to approximately 2,836,300 customers within the City of New York and a portion of Westchester County.

The anti-trust claims here assert essentially a conspiracy on the part of the appellee petroleum companies to restrain and monopolize trade and commerce in imported low sulphur oil for use on the east coast of the United States, their monopoly in the low sulphur oil industry, their exclusive control over the refinement capacity of such crude oil products, their common course of conduct to secure control over the transportation and distribution of such products, and their use of such exclusive control to limit the supply of low sulphur oil, as well as to fix and maintain its price at artificially high levels. The appellant electric utilities, are dependent upon a supply of low sulphur oil to generate electricity in view of environmental requirements prohibiting the use of fuel of higher air pollutant effect.

The cost of fuel used in generating electricity is an important factor in the rates charged by the appellant utilities for electric service. Such costs are borne directly by their customers. Increases and decreases in fuel costs are passed on or flowed through to the customers of each utility by means of the fuel adjustment clauses contained in their tariffs. If the utilities recover damages from appellees here on account of excess amounts paid for fuel oil, such recoveries, including any treble damages, related at least to fuel consumed, would be passed on to the ratepayers by means of the fuel adjustment clauses, in a manner that would be prescribed by the Commission.

ARGUMENT

THE DISTRICT COURT ERRED IN SUMMARILY
DISMISSING THE ANTI-TRUST CLAIMS.

The court below deemed the case to be ruled by Calderone Enterprises Corporation v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (CA2, 1971), certiorari denied 406 U.S. 930 (1972), and held, in essence, that appellants

lacked standing to sue because they were not targets of the conspiracy. In addition, it held that assuming there was standing, appellants were regulated public utilities ("a regulated monopoly") not engaged in any competition, could suffer no competitive disadvantage and therefore could establish no injury cognizable under the private law suit features of the anti-trust laws. We believe the court was patently wrong in both respects.

- A. The Court Erred In Concluding A Public Utility Not Engaged In Competition Is Barred From Recovery Under The Anti-trust Laws.

The District Court in essence found that, even assuming standing, the appellants could suffer no actionable damages via any competitive disadvantage in view of the non-competitive nature of public utility operations. This, however, was no obstacle to either maintenance of or recovery of damages in anti-trust actions by public utilities in the electrical equipment cases, and should not be a bar here either.

While it is not strictly accurate that appellants and other electric distribution companies are not competitive enterprises, neither appellant competes with other electric companies in rendering electric service. Electric utilities are natural monopolies in this sense and hence are regulated by public utility commissions to assure the lowest reasonable rates for consumers, consistent with the maintenance of adequate service. Contrary to the views of the court below, these considerations plainly provide no basis for depriving electric utilities and their customers of relief when a conspiracy to violate the anti-trust laws not only injures them but such injury could reasonably have been anticipated by the conspirators in undertaking illegal restraints. To be sure, the anti-trust laws are designed to promote competition or at least to prevent improper restraints on competition. But the essential purpose of these laws is to protect ultimate consumers since competition is assumed to accomplish that end. It would indeed be anomalous to immunize conspiracies to destroy competition among suppliers merely because the targets of such actions do not themselves engage in competitive activity.

Appellant utilities are expressly required by the Public Service Law to provide service to their customers at just and reasonable rates and implicitly to keep operating and fuel costs, which these rates reflect, at the lowest reasonable levels. And, as we noted above, if those costs have been kept unduly high because of anti-trust violations by appellees, at least most of any damages recovered here would be flowed through to the ultimate consumer, the intended beneficiary under both anti-trust and regulatory laws.

The court also had no basis for asserting that LILCO does not compete. To the contrary, as its complaint indicates (paragraph 53) it has substantial competition with the oil heating industry for space heating business.

In short, any inflated fuel costs paid by the appellant utilities as a direct result of a conspiracy would represent damages incurred by them and their consumers, whom they should be deemed to represent. The District Court's finding to the contrary is erroneous and should be reversed. Moreover, the court's intimation that Lybia acting alone is responsible for appellants' grievances is a factual question

which cannot reasonably be resolved summarily or absent a trial on the merits.

B. Plaintiffs Have Standing.

The District Court dismissed these actions on the authority of Calderone, holding that LILCO and Con Edison were not "targets" of the conspiracy alleged in their complaints and that, therefore, they did not have standing. We believe that the District Court applied Calderone with undue rigidity. In so doing, it did not give adequate weight to the strong public interest in these actions and, indeed, applied the target criterion here in an unreasonable and erroneous manner.

The Calderone decision recognizes the strong public policy favoring private anti-trust actions. It further recognizes that any judicial limitation on the right to sue must be tempered by a "rule of reason". However strong the desire of this Court might be to limit the proliferation of anti-trust suits or class actions by remotely situated private parties, there can be no question that appellants, albeit along with Lybia, were prime targets

of the conspirators who, as the complaints allege, were fully aware of appellants' dependence on the fuel oil and inevitably of the consequences of their anti-trust law violations.

Thus, even if we assume arguendo that Lybia was the "bull's eye" on defendants' conspiratorial target, appellants and their customers were close enough to center target to have been visible in the sights of the conspiratorial cannon as well as the target and the victims of its salvos.

Moreover, it should be fully understood that if LILCO and Con Edison do not have standing to bring these actions, then no one can bring them. The consumers of LILCO and Con Edison are not in a position to institute these actions. The stake of an individual consumer is too small to justify the expenditure. Accordingly, denied standing to appellants could immunize oil company conspiracies not only here but in a broad group of cases where, as have so often been true with respect to actions by major oil companies, the ultimate consumer suffers the major loss.

In these circumstances, appellants' standing to sue here in their own behalf and that of their customers is consistent with the public policy for the protection of the ultimate consumer underlying the private suit features of the anti-trust laws. Such standing is consistent, as well, with Calderone in that the ultimate consumer has an opportunity for redress while at the same time the courts are not burdened with a proliferation of suits by more remotely connected parties.

CONCLUSION

The judgment of the District Court should be reversed.

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May 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

S. CAROL DAMBRA, being duly sworn, deposes and says she is over 18 years of age, not a party to the action and that on the 6th day of May 1975, she served a copy of the annexed Motion and Affidavit, as well as three copies of the annexed proposed brief, amicus curiae upon each of the attorneys for the parties in the action whose names appear below, by mailing same in a sealed postpaid envelope directed to each of them at the address set forth.

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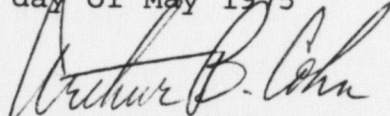
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S. Carol Dambra

Sworn to before me this
6th day of May 1975



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Term Expires March 30, 1977